Supreme Court, U.S.
FILED
SEP 16 1992
OFFICE OF THE CLERK

(2)

No. 92-6

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARK R. BOLADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select the judges of the courts of military review.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a, is not yet reported. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 2a-14a, is reported at 34 M.J. 732.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 2, 1992. The petition for a writ of certiorari was filed on June 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was charged with one count of attempted distribution of LSD and one count of attempted use of LSD, in violation of 10 U.S.C. 880, and two counts of use of LSD, in violation of 10 U.S.C. 912a. The trial judge dismissed the charges on the ground that petitioner's speedy trial rights had been violated. The government appealed the dismissal to the Navy-Marine Corps Court of Military Review, which reversed the trial judge's order and remanded the case for trial. The Court of Military Appeals granted petitioner's request for review and summarily affirmed the judgment of the Navy-Marine Corps Court of Military Review.

ARGUMENT

In this case, the Navy-Marine Corps Court of Military Review reversed the judgment of the trial judge and remanded the case for a court-martial. Petitioner challenges that action, arguing that the judges of the court of military review were appointed to that position by the Judge Advocate General of the Navy in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. That claim does not warrant review by this Court, for several reasons.

First, petitioner has not properly preserved his claim. Petitioner did not raise that contention in the court of military review or in the Court of Military Appeals, and neither court addressed this claim. Petitioner therefore cannot raise that claim for the first time in this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]")

(quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[1]

Relying on *Freytag* v. *Commissioner*, 111 S. Ct. 2631 (1991), petitioner asks this Court to forgive his waiver. *Freytag* involved an Appointments Clause challenge to the selection of special trial judges by the chief judge of the Tax Court, a challenge that the petitioners had not raised in that court. This Court said that it had the power to excuse the petitioners' waiver, and found *Freytag* to be "one of those rare cases in which we should exercise our discretion to hear petitioners' challenge" despite their failure to assert it in the courts below. 111 S. Ct. at 2639. Although petitioner urges this Court to follow the same approach in this case, he has not explained why the question in this case is of such imperative public importance that this Court should deviate from its firmly settled practice of declining to serve as a nisi prius court. In addition, the Court of Military Appeals has recently granted discretionary

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[1] The Court of Military Appeals did not grant review on this question. Accordingly, it is not clear that this question is subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 28 U.S.C. 1259(3) and 10 U.S.C. 867(h)(1), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory right to limit its decision in any case to less than all the issues urged by the accused. 10 U.S.C. 867(d). Since petitioner did not raise this issue for review by the Court of Military Appeals, there is a question whether that court rendered a "[d]ecision" on the issue that petitioner presents in his petition. For the reasons given in the text, however, it is unnecessary to answer that question in this case, since the question presented in the certiorari petition does not warrant review by this Court in any event.

review to resolve this question. See *United States* v. *Weiss*, No. 67869/MC (C.M.A. June 16, 1992). Once that court has spoken on the matter, there will be ample time to address the question presented by this petition.

Second, there is no conflict among the circuits on the question presented by the petition. Only two appellate courts have addressed the issue; both courts are intermediate appellate courts in the military justice system; and both courts rejected an Appointments Clause challenge to the composition of the courts of military review. See *United States* v. *Prive*, No. 984 (C.G.C.M.R. July 6, 1992); *United States* v. *Coffman*, No. 92-1030 (N.-M.C.M.R. June 3, 1992).

Third, petitioner's claim lacks merit. The Appointments Clause, Art. II, § 2, Cl. 2,[2] provides that only the President (with the advice and consent of the Senate) may appoint "Officers of the United States." By contrast, Congress can vest the power to appoint "inferior Officers" "in the President alone, in the Courts of Law, or in the Heads of Departments." In petitioner's view, the judges of the courts of military review are "inferior Officers," but the Judge Advocates General are neither "Courts of Law" nor "the Heads of Departments" and thus cannot appoint the judges of the courts of military review. The short answer to petitioner's argument is

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[2] The Appointments Clause, Art. II, § 2, Cl. 2, provides as follows:

> He [the President] * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

that because the members of the Navy-Marine Corps Court of Military Review that rendered the judgment challenged by petitioner were officers of the United States appointed by the President and confirmed by the Senate, an additional appointment pursuant to the Appointments Clause is unnecessary.

The courts of military review are part of a comprehensive system of military justice established by the Uniform Code of Military Justice. The Judge Advocates General of the services are primarily responsible for implementing the UCMJ.[3] In carrying out that obligation, the Judge Advocates General detail commissioned military officers to serve at almost every level of the military justice system.[4] Consistent with that scheme, Article 66(a) of the UCMJ, 10 U.S.C. 866(a), provides as follows (emphasis added):

> Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges.

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[3] The Judge Advocates General are defined as "the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, the General Counsel of the Department of Transportation." 10 U.S.C. 801(1).

[4] See, *e.g.*, 10 U.S.C. 801(13) (specifying that all "judge advocate[s]" must be military "officer[s]" serving in the various Judge Advocate General corps or other military "officer[s]" designated as "judge advocate[s]" or "law specialist[s]"), 826 (requiring the Judge Advocates General to certify and detail "commissioned officer[s] of the armed forces" to serve as military trial judges), 827(b) (specifying that prosecution and defense counsel who are, detailed to practice before courts-martial must be judge advocates, who are, by definition, commissioned military officers), 870 (providing that the Judge Advocate General shall "detail * * * commissioned officers" to serve as appellate counsel before the Courts of Military Review and the Court of Military Appeals).

> * * * Appellate military judges who are *assigned* to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

Pursuant to Article 66(a), the Judge Advocate General of the Navy established the Navy-Marine Corps Court of Military Review and detailed officers to serve on that court. At all times relevant to petitioner's appeal, only commissioned officers of the Navy and Marine Corps were assigned to serve as judges on that body. See Navy Judge Advocate Personnel and Activity Directory II-6 (1991) (listing the name and rank of the judges of the N-MCMR).[5]

Each commissioned officer in the Navy and Marine Corps is appointed, at least originally, by the President, with the advice and consent of the Senate.[6] As a matter

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[5] The provision of Article 66(a) authorizing the Judge Advocates General to assign civilians to serve on courts of military review is not at issue in this case. It is undisputed that no civilian has served on the N-MCMR during the consideration of petitioner's appeal. Accordingly, the only question presented in this case is whether the Judge Advocate General of the Navy has in fact assigned judges to the N-MCMR who are constitutionally authorized to exercise the duties of that office. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 126, 141 (1976).

[6] See 10 U.S.C. 531(a) ("Original appointments [of Regular Navy and Marine Corps officers] shall be made by the President, by and with the advice and consent of the Senate."), 593 (requiring Presidential appointment and Senate confirmation of military re-

of practice, the Judge Advocate General of the Navy has assigned to the Navy-Marine Corps Court of Military Review only those commissioned officers who are in the Navy Judge Advocate General's Corps and those who are designated by the Marine Corps as "judge advocate[s]" or "law specialist[s]." Congress recognized this practice by limiting the types of officers who could be "judge advocate[s]." See Art. 1(13), UCMJ, 10 U.S.C. 801(13). Judges on the Navy-Marine Corps Court of Military Review are commissioned military officers, and thus may be assigned to nonjudicial duties by the Navy Judge Advocate General as he deems necessary to meet the needs of the service. And it is well settled that Congress may modify existing duties or specify additional germane duties to be performed by an officer of the United States without thereby making it necessary for the incumbent again to be nominated, confirmed, and appointed pursuant to the Appointments Clause. See *Shoemaker* v. *United States*, 147 U.S. 282, 301 (1893).

In *Shoemaker*, the complainants challenged a statute establishing a commission to oversee the development of Rock Creek Park. 147 U.S. at 284. Three commission members were appointed by the President with the advice and consent of the Senate, but two military officers (the Chief of Engineers of the United States Army and the Engineer Commissioner of the District of Columbia) also were designated to serve on the commission. *Ibid.* Their presence was challenged on the ground that they had not been nominated to and confirmed for their new position. The Court rejected that claim, explaining that, *id.* at 301:

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serve officers), 624 (governing promotions of regular military officers), 5912 (governing appointments and promotions of reserve officers).

> [T]he two persons whose eligibility is questioned were at the time of the passage of the act * * * officers of the United States who had been theretofore appointed by the President and confirmed by the Senate[.] [W]e do not think that, because additional duties, germane to the offices already held [were added by Congress], it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

The Court ultimately held that "the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties." *Ibid.*; see also *Williams* v. *Mercer*, 783 F.2d 1488, 1515 (11th Cir.) (holding that members of the Investigating Committee of the Judicial Council of the Eleventh Circuit "were not 'appointed' by the chief judge within the meaning of the Appointments Clause * * * but rather [were] sitting federal judges already appointed by the President * * * [whose] service on [the Investigating Committee was] merely an outgrowth of their existing responsibilities"; citing *Shoemaker* for the proposition that "a statutory expansion of the functions of an existing position does not create a new office requiring re-appointment"), cert. denied, 477 U.S. 904 (1986).

Under that analysis, the assignment of any Navy or Marine Corps officer to serve a tour of duty on the Navy-Marine Corps Court of Military Review is entirely consistent with the Appointments Clause. All military officers are responsible for seeing to the discipline of the men in their command and are trained to enforce the civil and military law. Under the Uniform Code of Military

Justice, commissioned officers have a special duty "to quell quarrels, frays, and disorders among persons subject to [the Code] and to apprehend persons subject to [the Code] who take part therein." Art. 7(c), UCMJ, 10 U.S.C. 807(c). Every commanding officer is further authorized to impose certain "non-judicial punishment[s]," including arrest in quarters for not more than 30 consecutive days, instead of instituting court-martial proceedings. Art. 15, UCMJ, 10 U.S.C. 815. Moreover, only Marine Corps "law specialist[s]" and members of the Navy Judge Advocate General's Corps are assigned to serve on the Navy-Marine Corps Court of Military Review. For these reasons, the duties of a judge of the Navy-Marine Corps Court of Military Review are germane to the duties of the officers assigned to serve on that court. Petitioner's challenge to the composition of the court of military review therefore lacks merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1992